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JOSEPH F. SPANIOL, JR.

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CASE NO.

IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM 1986

SWIFT TEXTILES, INC.,

Petitioner,

v.

WATKINS MOTOR LINES, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS TO BE PRESENTED FOR REVIEW

- of Appeals err in holding that a motor carrier shipment from Savannah, Georgia to LaGrange, Georgia, following ocean transportation to Savannah, is subject to the Carmack Amendment to the Interstate Commerce Act, for purposes of determining the applicable statute of limitations rather then being subject to the Georgia statute of limitations.
- 2. Even if the instant shipment is subject to the <u>Carmack Amendment</u>, did the Eleventh Circuit Court of Appeals err in determining that Petitioner was bound by Respondent's contractual statute of limitations where the facts revealed that Petitioner had no actual notice of the statute of limitations (which was



incorporated solely by reference in Respondent's motor carrier tariff).



PARTIES TO THE PROCEEDING

The caption contains the names of all parties to this proceeding.



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OPINIONS

The Eleventh Circuit of Appeals rendered an opinion affirming the lower court's granting of Defendant/Respondent's motion for summary judgment, filed on the grounds that Plaintiff/Petitioner's complaint was barred by contractual statute of



limitations contained in Defendant/Respondent's ICC filed motor carrier tariff. The opinion and judgments of the Court of Appeals for the Eleventh Circuit is also contained in the Appendix ("1").

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was made and entered on September 15, 1986. A copy of its order denying Petition for Rehearing and Suggestion for Hearing En Banc was entered October 23, 1986 and is attached hereto in the Appendix ("2"). Jurisdiction of the Supreme Court is invoked under 28 U.S.C. Section 2102(c).



STATUTES INVOLVED

This case raises an issue under provisions of the <u>Carmack Amendment</u> to the <u>Interstate Commerce Act</u>, 49 U.S.C. Section 11707(e), which provides:

"A carrier may not provide by rule, contract, or otherwise, a period less than nine months for filing a claim against it under the section in a period of less than two years for bringing a civil action against it under the section. The period for bring a civil action is computed from the date the carrier gives a person written notice that the carrier has disallowed any part of the claim specified in the notice."

The case may also raise an issue concerning the scope of 49 U.S.C. Section 10521(a)(1)(E). This section provides: "subject to this chapter and other law,



the Interstate Commerce Commission has jurisdiction over transportation by motor carrier and the procurement of that transportation to the extent that passengers, property, or both, are transported by motor carrier - (1) between a place in (E) the United States and a place in a foreign country to the extent the transportation is in the United States ...

STATEMENT OF THE CASE

(i) Statement of the facts:

This case arose out of damage to Petitioner's cargo of spinning machinery which was being transported by Appellee's truck, from Savannah, Georgia to LaGrange, Georgia. The damage occurred, as alleged in Petitioner's complaint, when Respondent's truck rounded a corner in Greenville, Georgia. The containerized cargo became damaged when



the container twisted off of the truck chassis. Petitioner had purchased spinning machinery from a company in Switzerland. The machinery was to be used in Petitioner's plant in LaGrange, Georgia.

The spinning machinery was placed by the shipper in an ocean container. Thereafter, it was transported on a through ocean bill of lading aboard the M/V TFL ENTERPRISE from Hamburg, Germany to Savannah, Georgia. The through ocean bill of lading was issued by the ocean carrier, Trans Freight Lines, Inc. actuality, the vessel, unbeknownst to Petitioner, discharged the cargo in Charleston, South Carolina. Thereafter, the vessel arranged for truck transportation of the containerized cargo from Charleston, South Carolina to Savannah, Georgia. Before arranging for



the ocean carriage, it was Petitioner's understanding that the vessel would carry the cargo directly from Hamburg, Germany to Savannah, Georgia.

The ocean freight for carriage of its cargo from Hamburg, Germany to Savannah, Georgia was paid for by Petitioner through its customhouse broker, D.J. Powers, Inc. Respondent had no role in participating in the through ocean bill of lading carriage from Hamburg, Germany to Savannah, Georgia.

The spinning machinery purchased by Petitioner was contained in twenty-four (24) ocean containers. Knowing that these containers would have to be carried by truck from Savannah, Georgia to its warehouse in LaGrange, Georgia, David Haskell, a buyer with Petitioner, arranged for the inland carriage by negotiating with several motor carriers.



After reviewing the bids, Mr. Haskell determined to use the services of Respondent for the carriage of twenty-four (24) containers from Savannah to LaGrange. By bill of lading issued by Respondent, dated May 20, 1981, Respondent agreed to carry Petitioner's containers from Savannah to LaGrange. This bill of lading was the only documentation which Petitioner received from Respondent in connection with the contract of carriage.

The bill of lading, in the upper right hand corner, contains the following language:

"The property described below, in

a apparent good order, except as noted (contents and condition of contents of package unknown), marked, consigned, and destined as indicated below, which said



carrier (the word carrier being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carrier to its usual place of delivery at said destination, if on its route, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property overall or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the terms and conditions of the Uniform Domestic Straight Bill of Lading set forth (1) in official, Southern, Western and Illinois Freight Classifications in effect on the date



hereof, if this is a rail or or a rail-water shipment, or (2) in the applicable motor carrier classification or tariff if this is a motor carrier shipment".

In this connection, Petitioner never received the National Motor Freight Classification Rules nor did it receive the Watkins Motor Lines, Inc. Tariff.

Most significantly, the actual bill of lading was on a form which differed from that which Respondent had on file with the ICC, as shown in the Stipulation of Facts submitted to the lower court in the Pre-Trial Order. Appellee's bill of lading, on file with the ICC, contained a statute of limitations which required an action to be filed within two years and one day from denial of a claim by the carrier, (Section 2(b) to bill of lading). This section is contained on



the reverse side of the blank bill of lading form. Conversely, the bill of lading signed and issued by Appellee in this case, has a blank reverse side. Moreover, there is no specific reference in the issued bill of lading to any specific, identifiable tariff or, more significantly, a governing statute of limitations.

Respondent is a motor common carrier. While it was admitted that Respondent had a tariff on file with the Interstate Commerce Commission in Washington, D.C., Petitioner contended that this tariff, containing a two year statute of limitations (and one day), did not apply in this case. The evidence revealed that Respondent, although operating within the state of Georgia, did not have a tariff on file with the Georgia Public Service Commission. This



evidence was elicited through the Affidavit of David Haskell. Mr. Haskell's Affidavit also indicated that, in the course of dealings, Respondent never presented Petitioner with any documents identified by it in this case. Moreover, Respondent never told Petitioner about alleged ICC tariffs.

Taking the position that the Georgia four year statute of limitations applied, Petitioner filed the instant action on May 13, 1985. Respondent in its answer, asserted that the statute of limitations contained in its ICC tariff controlled; therefore, Respondent contended that the action was time barred. The lower court granted Respondent's motion for summary judgment. The Eleventh Circuit Court of Appeals affirmed.



BASIS FOR FEDERAL JURISDICTION BELOW

The District Court for the Southern District of Georgia, Savannah Division, had jurisdiction over this case pursuant to 28 U.S.C. Section 1331 and 1332.

ARGUMENT

A. The United States Eleventh
Circuit Court of Appeals, erred in
determining that Petitioner's claim
for cargo damage involving a
shipment from one point in Georgia
to another point in Georgia, fell under
the purview of the Carmack Amendment to
Interstate Commerce Act, (49 U.S.C.
Section 11707) and, therefore, erred in
holding that the Georgia four year
property statute of limitations did not
govern.

The Eleventh Circuit Court of Appeals held that the shipment of Petitioner's cargo from Savannah, Georgia



to LaGrange, Georgia, was a continuation of foreign commerce within the meaning of the Interstate Commerce Act, 49 U.S.C. Section 10521(a)(1)(E). Accordingly, the District Court held that Respondent's contractual statute of limitations, contained in its ICC filed tariff, governed. Respondent's contractual statute of limitations, which was not referred to either directly or indirectly in the bill of lading that it issued, to Petitioner, contained a provision that all claims for property damage against the carrier be brought within two years and one day following rejection of the claim by the carrier.

In accordance with this Court's decision in Reider v. Thompson, 339 U.S. 113 (1950), Petitioner contended that an inland shipment, from a point in one state to another point in that state,



constitutes intrastate commerce.

Accordingly, the forum state's statute of limitation, not provisions of the Carmack Amendment to the Interstate Commerce Act, would apply. If the shipment is deemed to be intrastate, then Georgia's four year statute of limitations would apply and, consequently, Petitioner's action would not be time barred.

This Court indicated in Reider v.

Thompson, Id. that a shipment from a foreign country to a United States port and, thereafter, to a point in the same state, is not subject to the Carmack Amendment of the Interstate Commerce Act.

In <u>Reider</u> goods were brought by an ocean carrier from Argentina to New Orleans. The ocean bill of lading governed the shipment only to New Orleans. Thereafter, a separate bill of



lading was issued for interstate carriage from New Orleans to Boston, Massachusetts. Since there was through bill of lading from Mexico to Boston, Massachusetts, the Carmack Amendment did apply to the separate inland bill of lading, which involved an interstate shipment. This Court's opinion was based upon the intent of the originating carrier as well as the obligation of the receiving carrier. Had there been a through bill of lading from Mexico to Boston, the Carmack Amendment, by its very terms, would not have applied.

Since the instant shipment involved a through ocean bill of lading from Hamburg, Germany to Savannah, Georgia and, thereafter, an inland bill of lading with a separate carrier from Savannah, Georgia to LaGrange, Georgia, the Carmack



Amendment does not apply of its own force. Consequently, Section 11707 of the <u>Carmack Amendment</u>, which permits a carrier to implement a contractual statute of limitations, would not apply.

The effect of the District Court opinion, and that of the Eleventh Circuit Court of Appeals opinion is to strain the interpretations of interstate intrastate. In the instant case, the intent of Petitioner was to have its goods shipped by an ocean carrier to Savannah, Georgia. Thereafter, by totally separate contract, it intended Respondent to carry its goods from Savannah, Georgia to LaGrange, Georgia. This shipment was, in the literal sense, totally intrastate. Consequently, the right of action for property damage, or any other cause of action, which Petitioner may have against Respondent



should be governed the Georgia statute of limitations, which places a four year time bar on property damage actions. For these reasons, the District Court, as well as the Eleventh Circuit Court of Appeals erred in holding that the Carmack Amendment applied.

B. The Eleventh Circuit Court of Appeals opinion that a contractual statute of limitation can be incorporated by reference to an ICC filed tariff, is in conflict with the opinion of another U.S. Circuit Court of Appeals.

The Eleventh Circuit Court of Appeals, having found that the <u>Carmack Amendment</u> applied, held that Respondent could incorporate its contractual statute of limitations solely by reference to a provision, also incorporated, in its ICC filed tariff. It is undisputed that Respondent's bill of lading issued for



the carriage of goods from Savannah, Georgia to LaGrange Georgia, did not contain a contractual statute of limitations. Rather, Respondent's bill of lading simply contained the general statement that it was subject to the terms of the carrier's tariff (unidentified). Consequently, Petitioner did not have actual notice of the contractual statute of limitations. Respondent did have an ICC filed tariff which contained reference to a contractual statute of limitations that required a shipper/consignee to bring an action within two years and one day following the carrier's rejection of a claim.

Interstate Commerce Act, does not require a regulated carrier place a contractual statute of limitation in its tariff.



Moreover, the <u>Carmack Amendment</u> does not contain a statute of limitations. Rather, Section 11707 of the <u>Carmack Amendment</u> simply states that a carrier may establish a statute of limitations by contract.

In conflict with the decision in Marvirazon Compania Naviera, S.A. v. H.J. Baker and Brothers, Inc., 674 F.2d 364, 366 (5th Cir. 1982), the Eleventh Circuit Court of Appeals, in the instant case, held that Respondent, which did not give Petitioner actual notice of its contractual limitations, could bind Respondent simply by referring Respondent to an unidentified tariff. On contrary, the Fifth Circuit in Marvirazon, Id., held that to bind a shipper to a provision not required by law to be contained in a tariff, the carrier must give the shipper actual



notice. Likewise, the Eleventh Circuit in Allstate Ins. Co. v. International Shipping Corp., 703 F.2d 497 (11th Cir. 1983) held that a carrier could not bind a shipper to a statute of limitations provision in its tariff unless it placed the shipper on actual notice of this provision. In other words, both the Fifth Circuit and the Eleventh Circuit in Allstate Ins. Co., Id. held that a carrier cannot incorporate a limitation of liability or contractual statute of limitations provision by reference where the governing statute does not require the limitation of liability or statute of limitation provision to be contained in the tariff. Consequently, the Eleventh Circuit Court's opinion in this case is in direct conflict with these two decisions.



Even if the Eleventh Circuit was correct in holding that the <u>Carmack Amendment</u> applied to the instant shipment, it is incorrect in holding that Petitioner, who had no actual notice of Respondent's contractual statute of limitations was bound by the doctrine of incorporation by reference.

CONCLUSION

Based on the foregoing, Petitioner submits that this Court grants its Writ of Certiorari.

Respectfully submitted,

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Counsel for Petitioner



APPENDIX 1

Sept 15 1986

IN THE UNITED STATES COURT OF APPEALS ELEVENTH CIRCUIT

85-9005. SWIFT TEXTILES, INC. V. WATKINS MOTOR LINES, INC.

BROWN, JOHN R., Circuit Judge:

A shipper whose goods were damaged in transit appeals from the District Court's ruling that its claim is barred by a statute of limitations contained in the carrier's tariff and incorporated by reference into the bill of lading. We conclude that the shipment in question came within ICC jurisdiction as a "continuation of foreign commerce" and that the bill of lading sufficiently incorporated the statute of limitations contained in the carrier's tariff. We therefore affirm.



How Swift Wasn't

The facts of this case are simple and not in dispute. Swift Textiles, Inc. (Swift) contracted to buy certain textile spinning machinery from a Swiss corporation. The machinery was placed in containers in Switzerland, shipped by rail to Hamburg, and loaded aboard a ship. The bill of lading issued by the ocean carrier shows Swift as the notify party in Savannah, Georgia and Swift's customs broker as the consignee.

The containers actually were unloaded in Charleston, South Carolina and trucked to Savannah under the ocean bill of lading. Upon their arrival in Savannah, they were stored temporarily until Swift's customs broker arranged with Watkins Motor Lines (Watkins) to truck the containers from Savannah to LaGrange, Georgia, their intended



destination inland. The transit from Savannah to LaGrange was under a short form bill of lading prepared by Swift's customs broker. The bill of lading was a preprinted standardized form which provided that the shipper was "familiar with all the terms and conditions of the [Uniform Domestic Straight b]ill of [L]ading ... set forth in the classification or tariff which governs the transportation of the shipment and the said terms and conditions are hereby agreed to by the shipper.... " The short form bill of lading also provided that the shipment would be subject to the terms of the "Uniform Domestic Straight Bill of Lading set forth ... in the applicable motor carrier classification or tariff...."

At the time of shipment, Watkins had on file with the Interstate Commerce



Commission (ICC) a classification providing for a two year and one day statute of limitations for bringing suit after a claim was denied. Watkins' tariff, also on file with the ICC, expressly incorporated the classification. Watkins had no tariff on file with the Georgia Public Service Commission and presumably was not authorized to make intrastate shipments in Georgia.

While en route to LaGrange, one of the containers partially slid off the truck chassis transporting it and the contents were damaged. Swift filed a claim for the damage with Watkins and it was denied on April 19, 1982. Swift filed the present suit on May 13, 1985, more than three years after the denial of its claim. The District Court granted



summary judgment for Watkins on the grounds that the applicable two year and one day statute of limitations contained in Watkins' tariff had run. Swift appeals.

When Is an Intrastate Shipment Not An Intrastate Shipment?

The first issue before us on appeal is whether the shipment of the textile spinning machine from Savannah, Georgia to LaGrange, Georgia is covered by the Carmack Amendment, 49 U.S.C. Sec. 11707, formerly 49 U.S.C. Sec. 20(11). Among other things, the Carmack Amendment (amending the Interstate Commerce Act) allows carriers to provide in their contracts with shippers statutes of limitations for bringing civil suits of not less than two



years. Thus, if the Carmack Amendment applies, Watkins had the authority to set its statute of limitations for bringing damage claims at two years and one day (as it did in its tariff), and Swift's claim is barred. If, on the other hand, the Carmack Amendment does not apply, then the applicable statute of limitations presumably must be determined by resort to state law, a question not reached by the District Court.

The Carmack Amendment applies when the ICC has jurisdiction over the shipment in question, 49 U.S.C. Sec.

[&]quot;A carrier may not provide by rule, contract, or otherwise, a period of less than nine months for filing a claim against it under the section and a period of less than two years for bringing a civil action against it under the section. The period for bringing a civil action is computed from the date the carrier gives a person written notice that the carrier has disallowed any part of the claim specified in the notice."

49 U.S.C. Sec. 11707(e).



- 11707(a). Among the shipments over which the ICC has jurisdiction are shipments "between a place in ... the United States and a place in a foreign country to the extent the transportation is in the United States..." 49 U.S.C. Sec. 10521(a)(1)(E) (the "continuation of foreign commerce" provision). Swift first argues that the Carmack Amendment does not apply to the shipment because it was an intrastate shipment under a separate bill of lading, not a "continuation of foreign commerce."
- [1] The nature of a shipment is not determined by a mechanical inspection of the bill of lading nor by when and to whom title passes but rather by "the essential character of the commerce," United States v. Erie R.R. Co., 280 U.S. 98, 102, 50 S.Ct. 51, 53, 74 L.Ed. 187, 206 (1929), as reflected by the



"intention formed prior to shipment, pursuant to which property is carried to a selected destination by a continuous or unified movement," Great N. Ry. Co. v. Thompson, 222 F.Supp. 573, 582 (D.N.D. 1963) (three-judge district court).

It is well-settled that, in determining whether a particular movement of freight is interstate or intrastate or foreign commerce, the intention existing at the time the movement starts governs and fixes the character of the shipment...

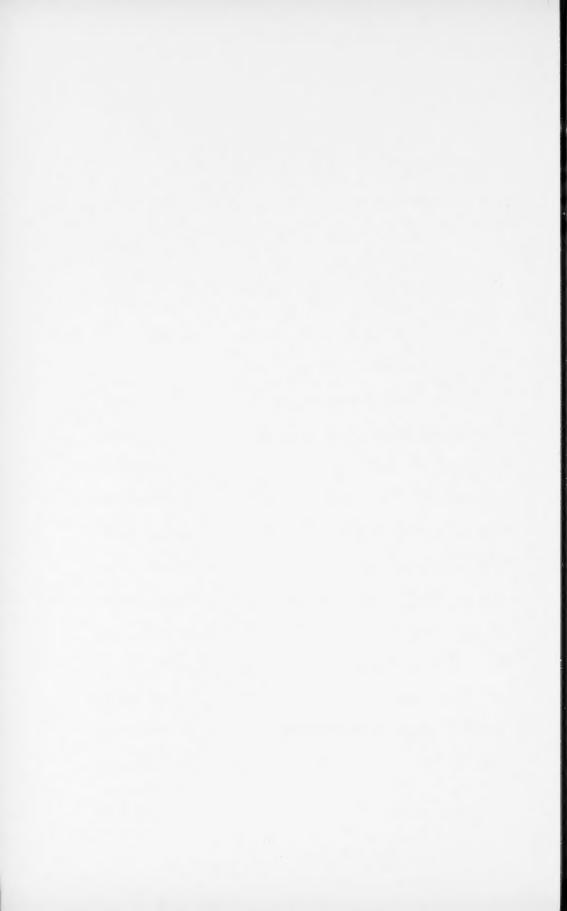
[T]emporary stoppage within the state, made necessary in furtherance of the interstate carriage, does not change its character.

State of Texas v. Anderson, Clayton & Co., 92F.2d 104, 107 (5th Cir.) (shipper intended cotton for export when cotton sent from Rochester, Texas to Houston;



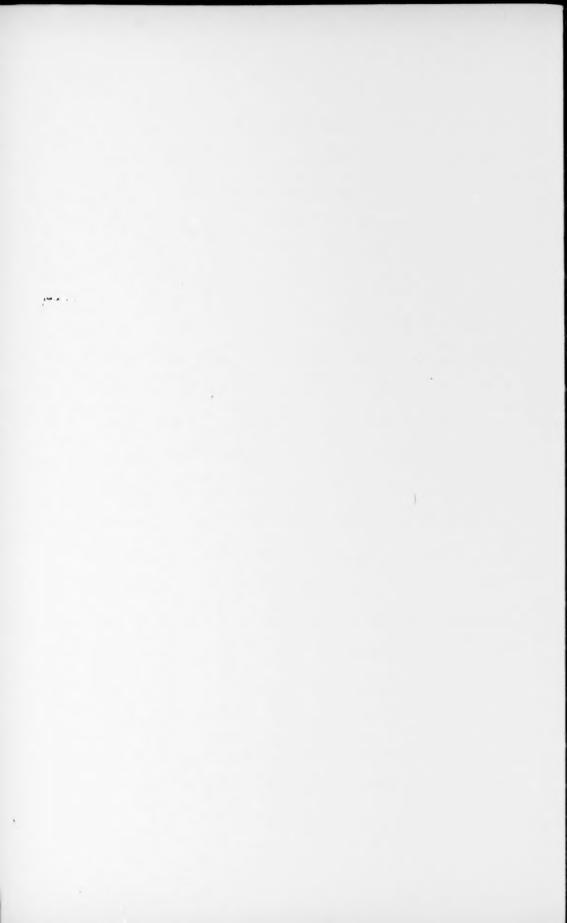
thus not an intrastate shipment), cert. denied, 302 U.S. 747, 58 S.Ct. 265, 82 L.Ed. 578 (1937).

A significant case on point applying the "intent" test is North Carolina Utilities Commission v. United States, 253 F.Supp. 930 (E.D.N.C.1966) (three-judge district court). In NCUC, a retail hardware chain received an order of iron and steel products from Belgium for distribution to eight retail stores located in various inland North Carolina cities. The order arrived by ocean carrier at the port of Wilmington, N.C. and was stored in facilities owned by the State Ports Authority for several days while the retail chain conducted an updated inventory needs determination at its various outlets. The goods then were loaded onto trucks and shipped under new bills of lading to each of the eight



stores. The issue before the Court was whether the transportation by truck from Wilmington to the various inland cities was intrastate or a "continuation of foreign commerce."

The Court applied a totality of the circumstances test, see Atlantic Coast Line R.R. Co. v. Standard Oil Co., 275 U.S. 257, 268-269, 48 S.Ct. 107, 110, 72 L.Ed. 270, 275 (1927), and held that the truck shipments represented a "continuation of foreign commerce" because they were intended to be part of the larger Belgium to inland North Carolina import shipment. Significant factors relied on by the Court were that the retailer owned no distribution or storage facility in Wilmington; the goods were held in Wilmington in a state-owned warehouse for periods of usually not more than three days; the retailer owned no



retail outlets in Wilmington; and no ad valorem tax was paid on the goods as they were temporarily stored in Wilmington. 253 F.Supp. at 936. In short, the retailer intended the goods to come to rest at its inland stores; it served no purpose for the goods to be in Wilmington other than for the retailer to conduct a brief inventory and then forward the goods to their intended destinations. "Wilmington ... is but a mere link in the chain of foreign commerce that continues until the goods have arrived at their intended destination, that is, at the individual ... stores." Id.

[2] In our case, it cannot be disputed that the shipment was intended to begin in Switzerland and end in LaGrange, Georgia. There was no reason for the container to come to rest in Savannah other than for the consignee's



customs broker to make arrangements for the Savannah to LaGrange leg of the journey. Applying the "intent" analysis, the fact that Watkins issued a separate bill of lading for the final intrastate leg of the journey is not significant. See Erie R.R. Co., 280 U.S. at 102, 50 S.Ct. at 53, 74 L.Ed. at 207 ("[The character of the shipment] is not affected by the fact that the transaction is ... completed under a local bill of lading which is wholly intrastate...."). Thus, the shipment was a "continuation of foreign commerce," the Carmack Amendment applied to the shipment, and the statute of limitations and the tariff on file with the ICC bars Swift's claim.

Swift also argues that, under the reasoning contained in Reider v.

Thompson, 339 U.S. 113, 70 S.Ct. 499, 94

L.Ed. 698 (1950), the Carmack Amendment



does not apply to this shipment. In Reider, a railroad received a shipment of wool at New Orleans for transportation to Boston and it issued a through bill of lading for the shipment. When the shipment arrived in a damaged condition in Boston, the shipper sued the railroad under the Carmack Amendment. While ordinarily there would be no question but that the Carmack Amendment applied to the interstate shipment from New Orleans to Boston, the case was complicated by the fact the wool was originally transported to New Orleans via steamship from Buenos Aires, Argentina. The railroad argued that the domestic railroad leg of the shipment was merely a portion of a "through foreign shipment" conducted under a "supplemental bill of lading," and the Carmack Amendment did not apply to such a foreign shipment. See Condakes



v. Smith, 281 F.Supp. 1014, 1015 (D.Mass. 1968) (shipment of cantaloupes from Mexico to Boston was not covered by Carmack Amendment because shipment was on a single through bill of lading).

The Supreme Court disagreed. It held that the steamship and railroad legs of the shipment were not different portions of one carriage but were in reality two entirely different movements. The Court described the New Orleans to Boston shipment as "new, separate, and distinct" from the Buenos Aires to New Orleans shipment. 339 U.S. at 117, 70 S.Ct. at 502, 94 L.Ed. at 701. Thus, the New Orleans to Boston shipment was not a continuation of a "through foreign shipment" but was merely a domestic interstate shipment and the Carmack Amendment applied.

Swift argues that the Court in



Reider found the New Orleans to Boston shipment to be governed by the Carmack Amendment because it was separate from the Buenos Aires to New Orleans shipment and because it crossed state lines. Thus, Swift contends, because the present shipment was covered by a separate bill of lading but did not cross state lines, it is not covered by the Carmack Amendment.

We cannot accept this interpretation because to do so would vitiate the "intent" inquiry that underlies all



modern interstate commerce analysis.²
The Court in <u>Reider</u> was unconcerned that the shipment in that case originated outside the United States because it found that the New Orleans to Boston shipment was not intended to be a continuation of the Buenos Aires to New Orleans shipment. Thus, the critical inquiry is not whether the domestic leg

An identical analysis is used to determine which goods are subject to local property taxes and which goods are exempted from such taxation by virtue of being in interstate or foreign transit. See, e.g., Michelin Tire Corp. v. Wages, 423 U.S. 276, 96 S.Ct. 535, 46 L.Ed2d 495 (1976). The same analysis also surfaces in other contexts which require that a distinction be made between interstate and intrastate commerce. See, e.g., Galbreath v. Gulf Oil Corp., 413 F.2d 941 (5th Cir. 1969) (truck drivers who transported certain petroleum products were engaged in interstate commerce and thus were not entitled to overtime compensation by virtue of the Motor Carrier Act exemption to the Fair Labor Standards Act).



leg of the shipment crossed a state border but rather it is whether the domestic leg of the shipment was intended to be part of a larger shipment originating in a foreign country. If it is part of such a larger shipment, then it is a shipment "between a place in ... the United States and a place in a foreign country to the extent the transportation is in the United States,"

49 U.S.C. Sec. 10521(a)(1)(E), and the Carmack Amendment applies.

[3] We therefore hold that when a shipment of foreign goods is sent to the United States with the intention that it come to final rest at a specific destination beyond its port of discharge, then the domestic leg of the journey (from the port of discharge to the intended destination) will be subject to the Carmack Amendment as long as the



domestic leg is covered by separate bill or bills of lading. It is irrelevant that the foreign and domestic legs of the voyage are effected by different shippers or carriers, that the intended consignee or its agent takes temporary custody of the goods at the port of discharge, or that the domestic leg does not cross state lines. Thus, Reider does not change our conclusion that the Savannah to LaGrange shipment was intended to be part of the larger Switzerland to LaGrange carriage and as such is covered by the Carmack Amendment as "continuation of foreign commerce."

Incorporating the Fine Print

[4] Swift also claims that, even if the truck shipment from Savannah to LaGrange was a continuation of foreign commerce, the statute of limitations contained in Watkins' classification and



incorporated in Watkins' ICC tariff was not adequately incorporated by reference in the short form bill of lading. Swift asserts that, as a shipper, it was only bound to those nonrate tariff provisions of which it had actual notice -- i.e., which were contained on the short form bill of lading. It is undisputed that no explicit statute of limitations provision was contained on the short form bill of lading -- on its face were printed only the general provisions that the shipment would be "subject to all the terms and conditions of the Uniform Domestic Straight Bill of Lading set forth ... in applicable motor carrier the classification or tariff...." and that the shipper agreed to those terms.

The binding or nonbinding effect of superfluous tariff or long form bill of lading provisions is an issue that has



Carriers often insert into tariffs and long form bills of lading various limitations of liability and other burdensome provisions -- not required by law to be there³ -- knowing that they will rarely be scrutinized in advance by shippers. Thus, the courts occasionally step forward to protect shippers in particularly compelling circumstances.

For example, in Encyclopaedia
Britannica, Inc. v. SS Hong Kong Producer,
422 F.2d 7 (2d Cir. 1969), the carrier
issued a short form bill of lading which
incorporated by reference a long form
bill of lading. The long form bill of
lading allowed the carrier to stow cargo

³ For ease of reference, these provisions will hereafter be referred to as "nonmandatory" provisions.

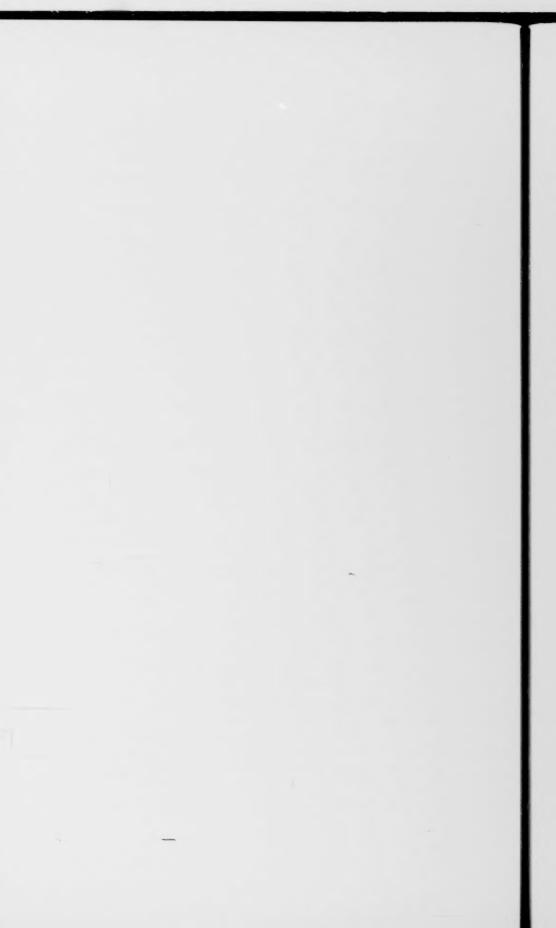


on deck -- unless instructed before loading in writing not to -- and placed the risk of loss of such above-deck cargo on the shipper unless the shipper could affirmatively prove the carrier's lack of due diligence. When the shipper could affirmatively prove the carrier's lack of due diligence. When the shipper's containerized cargo carried above deck was water damaged in transit, the carrier attempted to raise as a defense the bill of lading provision allowing above-deck stowage. The Court held that the shipper could not invoke the long form bill of lading clause, referred to by the Court as Clause 13.

> In the first place Clause 13 places the burden of inquiry on the shipper, in circumstances in which it is highly unlikely that such an inquiry would be made, to search out



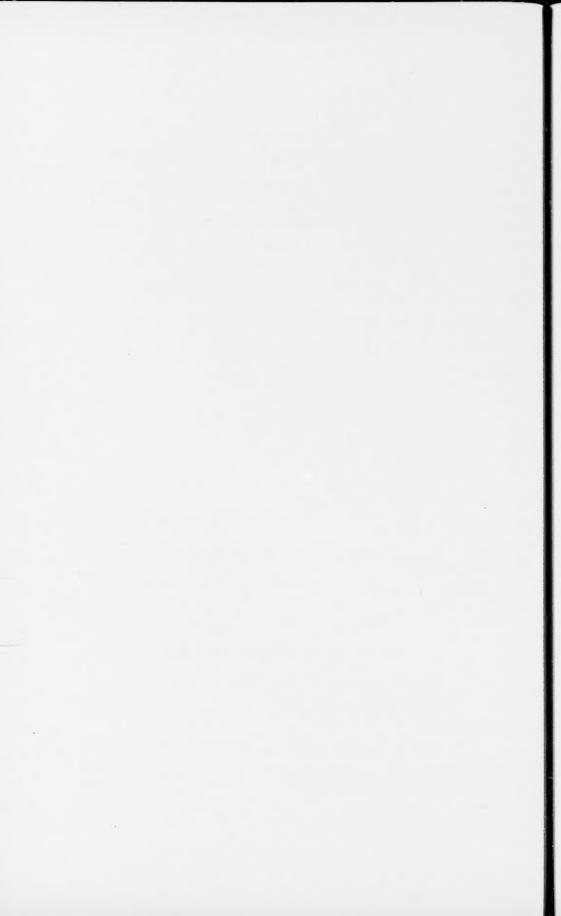
a copy of the carrier's regular bill of lading to discover a clause which in effect authorizes a serious deviation from the standard provisions and which can only be prevented by the shipper's assuming the burden of giving notice to the carrier before delivery that below deck stowage is required. Even if the shipper, as in this case, never made any actual representation that the goods need not be stowed under deck, as Clause 13 says, never agreed that they might be stowed on deck and never had any notice or knowledge of the provisions of Clause 13, it would, nevertheless, by default lose the right to have its goods stowed below deck. Once the shipper has by default lost the right to under deck stowage, the



concept behind Clause 13 assumes that the carrier is thereafter in a position to claim that the shipper has lost all its rights under COGSA because Sec. 1301 [46 U.S.C. Sec. 1301] by definition eliminates deck cargo from the provisions of the Act.

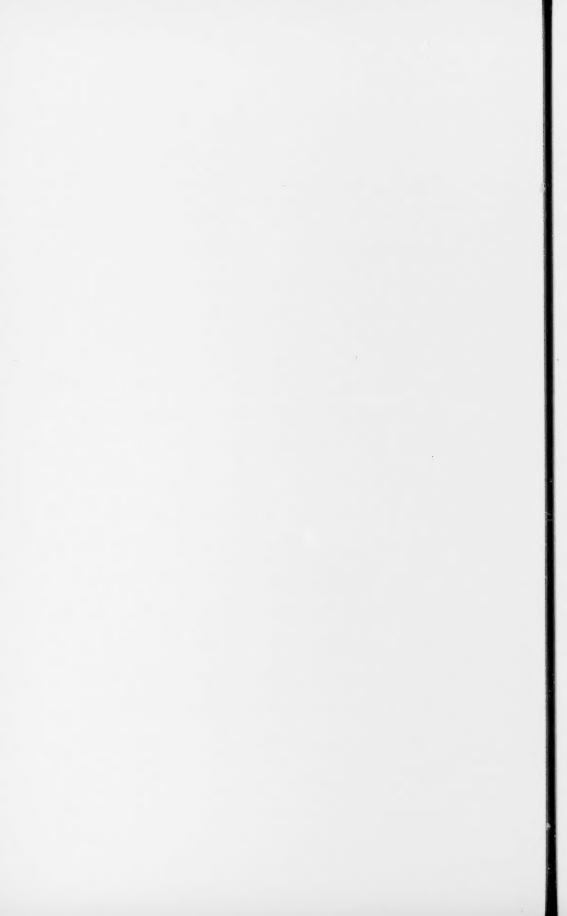
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What aids to its unfairness is the context in which the ocean bill of lading functions. In accepting the short form, the shipper relies upon the fact that the long form, which is incorporated by reference, contains only the usual provisions which closely follow COGSA, unless there is some warning on the fact of the short form of special terms or exceptions which differ from the COGSA provisions. If there is no

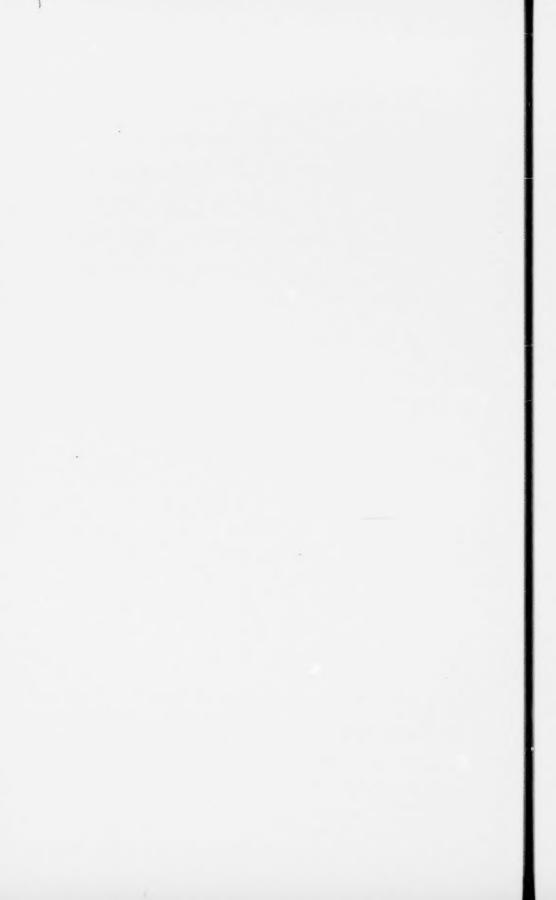


definite agreement one way or the other, the shipper is entitled to expect below deck stowage. It is impractical for a shipper to be compelled to make a detailed study of all of the fine print clauses of the carrier's regular bill on each occasion before it ships out a package. One of the principal purposes of COGSA was to obviate the necessity for doing so.

422 F.2d at 13-14 (footnote omitted, emphasis supplied, bracketed material added). Thus, although the contested clause did not violate COGSA per se and although the Court did not challenge the carrier's ability to incorporate by reference the long form bill of lading into the short form, the Court prevented the carrier from invoking the clause against the shipper.



In Allstate Insurance Co. v. International Shipping Corp., 708 F.2d 497 (11th Cir. 1983), the Court prevented a shipper from enforcing a one-year statute of limitations provision contained in a long form bill of lading. Before shipment, the carrier had opened the shipper's containers and placed the cargo outdoors unprotected from the elements. When the cargo insurer brought an action for the cargo damage about 20 months following delivery, the carrier raised as its defense a one-year statute of limitations contained in a long form bill of lading on file with the Federal Maritime Commission and incorporated by reference in the short form bill of lading issued to the shipper. This Court held that only the required tariff filed with the Federal Maritime Commission -not the entire long form bill of lading



-- had the force of law. Id. at 500.

Every clause in every bill of lading filed with the FMC cannot have the force and effect of law particularly when clauses frequently inserted in filed bills of lading have been struck as violative of public policy or existing statutes. See Encyclopaedia Britannica, Inc. v. SS Hong Kong Producer, 422 F.2d 7, 12 (2d Cir. 1969) (certain clauses in bills of lading violate COGSA; COGSA prevails). Marvirazon Compania Naviera, S.A. v. H.J. Baker & Brothers, Inc., 674 F.2d 364, 366 (5th Cir. 1982) is on point and we find it persuasive:

The limitation of liability provisions in the tariff, under which A & G brings this appeal, were not related to rates or charges and

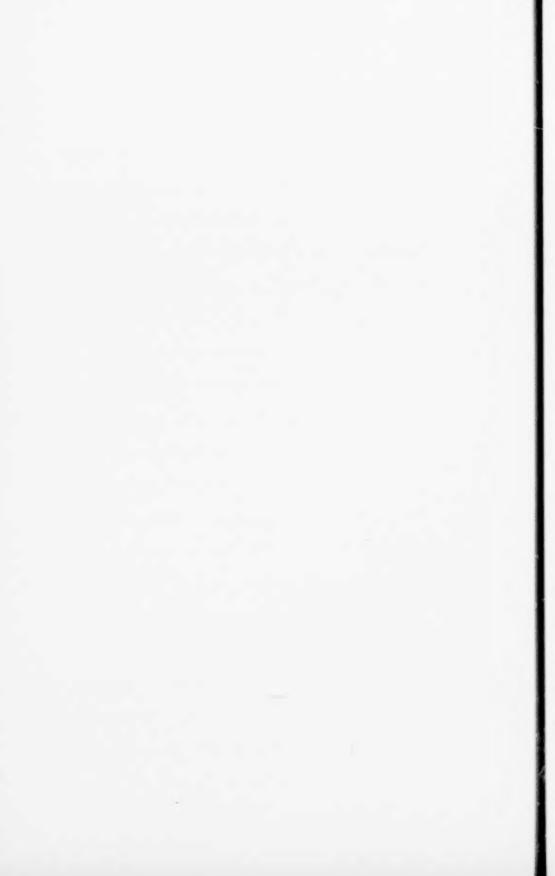


therefore were not required by law to be within the tariff.... knowledge of the limitation clause cannot be imputed to Marvirazon simply by filing the tariff with the Federal Trade Commission, because it is not required by law to be in the tariff.

Id. at n. 1, n. 2 (citation omitted).

Second, we are reluctant to give effect to limiting clauses with which "a carrier could shield itself from liability through manipulation or fine print clauses contained in standardized contract forms."

Calmaquip Engineering West Hemisphere Corporation v. West Coast Carriers Ltd., 650 F.2d 633, 639-40 (5th Cir. Unit B 1981) citing Encyclopaedia Britannica, supra at 14. In this regard we follow the



Second Circuit's decision in Encyclopaedia Britannica, supra; we will not limit the period within which [the insurer] could bring suit when that limit was expressed in fine print in a document never specifically brought to [the shipper's] attention, and when [the shipper had no] actual knowledge of its terms. Id. at 14. This is particularly so where the limitation arquably conflicts with the absence of a specific limitations period under the Harter Act.

Id. (footnote omitted, emphasis supplied, bracketed material added).

Swift argues that our present case is governed by Allstate. Because Watkins was not required to include in its ICC tariff a statute of limitations, and because no statute of limitations was



specifically referenced in the short form bill of lading, Swift claims that it is not bound by that limitation. We do not read <u>Allstate</u> and its predecessors so broadly, however.

First, neither Allstate, Marvirazon, nor Encyclopaedia Britannica held that a shipper without actual notice is not bound by all nonmandatory tariff provisions. In Encyclopaedia Britannica, the Court held that it was unfair to enforce a long form bill of lading provision which substantially modified COGSA's provisions when there was no warning to that effect contained in the short form bill of lading. 422 F.2d at 14. In Marvirazon, the Fifth Circuit merely held that a stevedore's tariff provision could not be invoked against an unknowing shipowner when it was the charterer's agent who contracted for the



Encyclopaedia Britannica: without actual notice to the shipper, the Court refused to enforce a nonmandatory tariff provision that conflicted with the typical provisions associated with the governing federal statutes -- COGSA and the Harter Act -- traditionally incorporated by reference into all tariffs and long form bills of lading.

Here, however, the situation is quite different. The two-year and one day statute of limitations contained in Watkins' classification and incorporated into Watkins' tariff does not conflict with the Carmack Amendment. Rather, it is expressly contemplated and sanctioned



by the Carmack Amendment. Furthermore, the National Motor Freight Classifications (NMF 100-H) filed by Watkins with the ICC and incorporated into Watkins' tariff is the standard in the trucking industry. Its provisions are the rule rather than the exception. We are simply not presented with the same situation faced by the Courts in Encyclopaedia Britannica and Allstate.

The second reason why we believe Allstate does not apply is because it was

See note 1 supra. The Carmack Amendment on its face contemplates that the choice of a statute of limitation is to lie with the shipper subject to the minimum time limit prescribed by the Act. Although the two year and one day period is not mandatory in the sense that it is imposed as an absolute by the Act, the Act clearly anticipates statutes of limitations and legislatively approves any limitation period exceeding two years. A natural way to manifest the carrier's choice of a limitation period would be in the tariff classification which motor carriers have to file.



Swift's agent -- its customs broker -who prepared the bill of lading of which Swift now complains. The policy behind the Allstate and Encyclopaedia Britannica holdings is simply that the courts should be "reluctant to give effect to limiting clauses with which 'a carrier could shield itself from liability through manipulation of fine print clauses contained in standardized contract forms.' Calmaquip Engineering West Hemisphere Corporation v. West Coast Carriers Ltd., 650 F.2d 633, 639-40 (5th Cir. Unit B 1981) citing Encyclopaedia Britannica, supra at 14." Allstate, 703 F.2d at 500. But here we do not have a devious carrier hoping to slip a quick one over on an unsuspecting shipper. Rather it is the shipper's own agent who prepared the short form bill of lading on its own preprinted standardized contract



form. If the shipper's agent thereby incorporated an industry-wide, indisputably legal, and federally sanctioned statute of limitations, the shipper cannot now be heard to complain about it.

We take no issue with Encyclopaedia Britannica and Allstate -- on the facts before those Courts, the results reached were eminently reasonably and prevented injustice. But we are not prepared to strike down all tariff provisions of which a shipper has no actual notice. Such a result would quickly force carriers to enlarge the bills of lading issued to shippers into mammoth documents containing paragraph upon paragraph of unreadable fine print. Even with such lengthy documents in their possession, shippers would be no more inclined to read them than they are currently



inclined to seek out and read long form bills of lading.

For the foregoing reasons, the District Court is in all respects correct.

AFFIRMED.



APPENDIX 2

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

	NO.	85-9005	

Plaintiff-Appellant

versus

WATKINS MOTOR LINES, INC.,
Defendant-Appellee

Appeal from the United States District Court for the Southern District of Georgia



Before Hill and Vance, Circuit Judges, and Brown*, Senior Circuit Judge.

PER CURIAM:

- (x) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.
- () The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35,

*Honorable John R. Brown, Senior Circuit Judge for the Fifth Circuit, sitting by designation.



Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also denied.

() A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

UNITED STATES CIRCUIT JUDGE

ENTERED FOR THE COURT:



APPENDIX 3

IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM 1986

SWIFT TEXTILES, INC.,		
Petitioner,		
vs.	Eleventh Case No.	
WATKINS MOTOR LINES,) case No.	85-9005
Respondent.)	

PROOF OF FILING AND SERVICE

I, the undersigned ALAN S. GAYNOR, attorney of record for the Petitioner and a member of the Bar of the Supreme Court of the United States, deposes and says that on the 215 day of January, 1987, I filed 40 copies of the foregoing WRIT OF CERTIORARI to the Supreme Court of the United States with the Clerk of the Supreme Court of the United States and I served three copies of this WRIT OF CERTIORARI to the Supreme Court of the United States and I served three copies of this WRIT OF CERTIORARI to the Supreme Court of the United States on John B. Miller,



attorney for Respondent, whose address is Miller, Simpson & Tatum, Post Office Box 1567, Savannah, Georgia 31498, who are all the parties required to be served, by causing to be placed these copies of said WRIT OF CERTIORARI in an authorized depository for mail at a United States Post Office in a properly addressed envelope with sufficient prepaid postage thereon to insure First Class Certified Mail delivery within the time allowed for such filing.

THIS 26 day of January, 1987.

ALAN S. GAYNOR

Attorney for Petitioner 86-13200

Supreme Court, U.S. F. I. L. E. D.

JAN 20 1987

JOSEPH F. SPANIOL, JR., CLERK

CASE NO.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1986

SWIFT TEXTILES, INC.,
Petitioner,

v.

WATKINS MOTOR LINES, INC.,
Respondent.

SUPPLEMENTAL APPENDIX TO PETITION FOR PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

ALAN S. GAYNOR Post Office Box 2139 Savannah, Georgia 31498

Counsel for Petitioners

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APPENDIX 4

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA SAVANNAH DIVISION

,)
CV 485-181
}
) RDER

Plaintiff brought this action to recover for damage caused by defendant's alleged negligence in handling a container of spinning equipment bound for LaGrange, Georgia. Before the Court is defendant's motion for summary judgment.

I. Background

Plaintiff Swift Textiles, Inc. ("Swift") is a Delaware corporation with its principal place of business in New York, New York. Swift maintains an office and place of doing business in LaGrange,



Georgia, and is engaged in the textile manufacturing business. Defendant Watkins Motor Lines, Inc. ("Watkins") is a Florida corporation with its principal place of business in Lakeland, Florida. Watkins maintains an office and place of doing business in Savannah, Georgia. Watkins is a motor common carrier, and is engaged in the trucking business. This Court has jurisdiction of this action pursuant to 28 U.S.C. Section 1332.

In 1981, Swift purchased spinning machinery from the Rieter Machine Works, Ltd. ("Rieter") in Switzerland. The spinning machinery was placed into ocean containers, shipped from Rieter's plant by rail to the port at Hamburg, Germany, and loaded aboard the vessel TFL ENTERPRISE.

See Affidavit of Swift employee David Haskell, Sections 1-4.



The ocean bill of lading issued by TFL, Inc. shows Rieter as the exporter, D.J. Powers Co., Inc. of Savannah, Georgia ("Powers") as the cosignee, and Swift as the notify party. The port of discharge is listed on the ocean bill of Charleston, South Carolina, and the place of delivery is shown as Savannah, Georgia.

The containers arrived in Charleston and were shipped overland to Savannah by inland carrier under the ocean bill of lading. 1 Upon arrival in Savannah, the containers were stored temporarily at the yard of the Delta Trucking Company. See

^{1.} The parties stipulated in an attachment to the Proposed Pretrial Order that "[t]he movement under the Ocean Bill terminated at the Port of Savannah and the movement from Savannah to LaGrange was under the Motor Carrier Bill of Lading." Stipulation of Facts, p. 3. Copies of the ocean bill and the domestic straight bill of lading are attached to the Stipulation of Facts as exhibits.



Affidavit of Watkins Vice President Kenneth Grider, Section 1. Shortly thereafter, the customs house broker and cosignee, Powers, retained Watkins² to transport the containers from Savannah to LaGrange.

The transit from Savannah to LaGrange was under a uniform domestic straight bill of lading dated May 20, 1981. "The Motor Carrier Bill of Lading under which the container moved from Savannah to LaGrange was prepared by D.J. Powers, Freight Forwarders, of Savannah, as agents for the plaintiff." See Stipulation of Facts, pp. 1-2. The bill of lading expressly certified that "the property in this receipt was imported in the TFL

^{2.} Watkins Landspan, a division of Watkins Motor Lines, Inc., actually moved the freight. See Affidavit of Sharon E. Maloy, p.2.



ENTERPRISE." The bill also acknowledged that the shipment was "received subject to all the classifications and tariffs in effect on the date of the issue of this Bill of Lading," and listed Swift as the shipper and cosignee.

The bill of lading further provided in fine print that:

... It is mutually agreed, as to each carrier .. and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the terms and conditions of the Uniform Domestic Straight Bill of Lading set forth ...

(2) in the applicable motor carrier classification or tariff if this is a motor carrier shipment.

Shipper hereby certifies that he is familiar with all the terms and conditions of the said bill lading, including those on the back thereof, set forth in tariff classification or which governs the transportation of this shipment, and the said terms and conditions are hereby agreed to by the shipper and accepted for himself and his assigns."



The parties have stipulated that Watkins had on file with the Interstate Commerce Commission ("ICC") in May, 1981, National Motor Freight Classification NMF 100-H ("Classification 100"). Section 2(b) of the contract terms and conditions of Classification 100 provides that suit must be brought within two years and one day of notice in writing from the carrier denying a claim for property damage. Watkins also had published and one file with the ICC Tariff ICC WWAT 701 ("Tariff W 701"). Tariff W 701 incorporated by reference Classification 100. See Tariff W 701 at p. 10. Copies of both documents are attached to the Stipulation of Facts. The only Watkins' classifications and tariffs in existence were those on file with the ICC. Watkins had none on file with the Georgia Public Service Commission ("PSC"). See



Stipulation of Facts, p. 1.

3

Watkins issued its freight bill to Swift dated May 26, 1981. See Exhibit "D" attached to the Stipulation of Facts. The freight bill shows that the containers were shipped under, and plaintiff billed according to, Tariff W 701.3

While enroute from Savannah to LaGrange on May 26, 1981, the container in question (No.

TFLU4519596) slid partially off its chassis as the Watkins' driver negotiated a turn around the courthouse square in Greenville, Georgia, causing extensive

^{3.} The rates and charges listed in Tariff W 701 apply to "containers having a prior or subsequent movement by water." See Tariff W 701, p. 13, attached to Stipulation of Facts.



damage to the spinning equipment stored therein.

Plaintiff submitted its written notice of claim for property damage by letter dated February 1, 1982. Defendant denied plaintiff's claim by a letter dated April 19, 1982. See Affidavit of Watkins' Vice President Kenneth Grider. Plaintiff filed this action on May 13, 1985.

Watkins now moves for summary judgment because Swift did not file suit within two years and one day after denial of the claim. In support of its argument, defendant cites the Carmack amendment, 49 U.S.C.



Section 11707(e), 4 the bill of lading between Swift and Watkins, and the applicable classifications and tariffs quoted, supra.

Defendant contends that this shipment was the continuation of foreign commerce; hence, the transport in question was under ICC

- 4. The portion of the Carmack amendment at issue provides, in pertinent part, that [a] carrier may not provide by rule, contract, or otherwise, a period of less than 9 months for filing a claim against it under this section and a period of less than 2 years for bringing a civil action against it under this section.
- 49 U.S.C. Section 17707(e). This section, however, is not a statute of limitations, but rather, a statutory determination of what is a reasonable period of limitations for a carrier to impose. Louisiana & Western R.R. Co. v. Gardiner, 273 U.S. 280, 284, 47 S.Ct. 386, 388, 71 L.Ed. 644 (1927); Westhemeco Ltd. v. New Hampshire Insurance Co., 484 F.Supp. 1158, 1161 (S.D.N.Y. 1980).



jurisdiction, and the classifications and tariffs "in effect" on the date of issuance and "applicable" to this shipment were those filed with the ICC and quoted, supra. These classifications and tariffs provide for a limitation period for filing suit, as allowed by the Carmack amendment, with which plaintiff has not complied. Therefore, plaintiff is bound by the terms of the bill of lading signed by its agent, its suit was untimely filed, and summary judgment for the defendant must be granted. Second, defendant contends that if the transit from Savannah to LaGrange is found to be intrastate, plaintiff is still barred under State law by the doctrine of incorporation by reference.

Plaintiff, seeking to avoid the limitation, argues that the transport of the container from Savannah to LaGrange



was intrastate. Swift contends that the classifications and tariffs "in effect" or "applicable" to this shipment should be those on file with the PSC because it was an intrastate shipment. Since it is undisputed that Watkins had classifications or tariffs on file with the PSC, see Stipulation of Fact, p. 1, plaintiff asserts that Georgia's four year statute of limitations governs this action. O.C.G.A. Section 9-3-32. Thus, Plaintiff's suit would not be barred. Furthermore, plaintiff contends that the Carmack amendment, which allows limitations periods such as the one in controversy here to be placed in bills of lading where transport is under ICC jurisdiction, does not apply to imports shipped under "through bills of lading." Finally, plaintiff asserts that



if the shipment was intrastate, there was no valid incorporation by reference.

II. Law and Analysis

A. Foreign or Intrastate Commerce?

The outcome of this case hinges upon whether the movement of the container from Savannah to LaGrange was a continuation of foreign commerce subject to ICC jurisdiction, or whether it was merely an intrastate journey.

Article 1, Section 8 of the Constitution grants Congress the power to regulate interstate and foreign commerce. Pursuant to this grant, Congress established the ICC, and vested with it, inter alia, the regulation of the transportation of passengers or property by motor carrier in interstate or foreign commerce:



SUBCHAPTER II - MOTOR CARRIER TRANSPORTATION

Section 10521. General Jurisdiction

- (a) Subject to this chapter and other law, the Interstate Commerce Commission has jurisdiction over transportation by motor carrier and the procurement of that transportation to the extent that passengers, property, or both, are transported by motor carrier -
 - (1) between a place in -
- (A) a State and a place
 in another State;
- (B) a State and another place in the same State through another State;
- (C) the United States and a place in a territory or possession of the United States to the extent the transportation is in the United States;
- (D) the United States and another place in the United States through a foreign county to the extent the transportation is in the United States; or
- (E) the United States and a place in a foreign country to the extent the transportation is in the United States; and



(2) in a reservation under the exclusive jurisdiction of the United States or on a public highway

49 U.S.C. Section 10521 (emphasis added).

A carrier providing transportation subject to ICC jurisdiction is required to publish and file with the ICC appropriate tariffs. 49 U.S.C. Section 10762. The transportation of such freight without prior filing of tariffs with the ICC is prohibited. 49 U.S.C. Section 10761. Tariffs have the force of law, and both carriers and shippers alike are bound by provisions of such tariffs. Farley Terminal Co. v. Atchison, Topeka & Santa Fe Ry. Co., 522 F.2d 1095 (9th Cir.), cert. denied, 423 U.S. 996 (1975).

A determination of what constitutes a foreign commerce cannot be made by mechanical application of the statute, but must take into account the totality of



circumstances surrounding the transit of the goods. The following quotation from Powell v. United States summarizes quite well some of the factors which should be considered:

...(T)he nature of the shipment is not dependent upon the question when or to whom the title passes. Pennsylvania R. Co. v. Clark Bros. Coal Mining Co., 238 U.S. 456, 465-66 ... It is determined by the essential character of the commerce. Baltimore & Ohio S.W.R. Co. v. Settle, 260 U.S. 166, 170 ... It is not affected by the fact that the transaction is initiated or completed under a local bill of lading which is wholly intrastate, Ohio R.R. Commission v. Worthington, 225 U.S. 101, 108-110; Texas & New Orleans R. Co. v. Sabine Tram Co., 227 U.S. 111; Hughes Bros. Timber Co. v. Minnesota, 272 U.S. 469, ... or by the fact that there may be a detention before or after the shipment on the local bill of lading. Carson Petroleum Co. v. Vial, 279 U.S. 95 (1928).

Powell v. United States, 112 F.2d 764, 766

(4th Cir. 1949); see also Farmers Union

Coop. Mktg. Ass'n. v. State Corp.

Commission of Kansas, 302 F. Supp. 778,



783 (D.Kan. 1969).

Another court has listed the following as factors to be considered:

(1) the mere form of a bill of lading or contract is not decisive, Atlantic Coast Line Railroad Co. v. Standard Oil Co. of Ky., 275 U.S. 257 (1927); (2) the reshipment of imported goods within the same state does not necessarily establish a continuity of movement placing the goods in foreign commerce. Id.; (3) the nature of the shipment is not dependent upon the question when or to whom title passes, Pennsylvania Railway Co. v. Clark Bros. Coal Min. Co., 238 U.S. 456 (1914); (4) that the shipment involved is wholly on an intrastate bill of lading is not conclusive, Railroad Commission of Ohio v. Worthington, 225 U.S. 101 (1911); (5) nor is continuity in movement terminated by the transfer of goods from one mode of transportation to another. Dallum v. Farmers Cooperative Trucking Association, 46 F.Supp. 785 (D. Minn. 1942)

The more general statements appear with respect to the controlling factors. Thus, (1) the nature of the shipment "is determined by the essential character of the commerce", United States v. Erie Railroad Co., 280 U.S. 98; (2) "It is the intention formed prior to shipment, pursuant to which property



is carried to a selected destination by a continuous or unified movement, which fixes its essential character."

Great Northern Railway Co. v.

Thompson, 222 F. Supp. 573, 582 (D.C.N.D. 1963).

North Carolina Utilities Commission v.

United States, 253 F.Supp. 930, 934

(E.D.N.C. 1966).

The North Carolina Utilities Commission decision is instructive here. In this case, the state agency brought an action against the United States seeking to annul a decision of the ICC which held that certain shipments by truck of imported iron and steel products from the port of Wilmington, North Carolina to other cities in North Carolina were in foreign commerce, and hence subject to regulation by the ICC. Id. at 932. Plaintiff contended that this transportation of goods from Wilmington to inland North Carolina cities was



intrastate commerce subject to its
control, not that of the ICC. Id. at 933.

The goods involved were nails, barbed wire, pipe, etc., manufactured in Belgium and ordered by Lowe's companies, Inc. ("Lowe's"), the parent company of several separately incorporated stores, from the foreign producers. Id. at 932-33. After discussing the facts and the factors quoted, supra, the Court stated:

Bared to the essentials, the facts in the principal case disclose that Lowe's inventories the needs of its several inland stores; it sends an order, based on the aggregate needs, to a Belgian producer; six months later the goods arrive at Wilmington, whence they are shipped inland [under new bills of lading] to the several stores pursuant to a rapid re-examination individual needs. The net effect is that goods have come from Belgium to the several inland cities pursuant to the intent formed by Lowe's six months earlier to import foreign goods for distribution through its outlets. No distribution or storage facility is owned by Lowe's in Wilmington. The goods while there are in a state warehouse, usually for



not more than three days; they are imported, not by a distributor with his business located in Wilmington, but by Lowe's with its business located eight North Carolina in No tax is ever paid on the cities. goods as they rest in Wilmington. Nor is the ultimate purpose of Lowe's subserved upon their arrival there. The obvious and dominant intent of Lowe's remains the same throughout the transaction - to obtain goods from Belgium destined for delivery at its eight inland stores in North Carolina for sale to the public. Manifestly, the docks at Wilmington are not the intended destination. There is no purpose to store the cargo there to effect the efficient distribution to Lowe's customers. Wilmington, therefore, is but a mere link in the chain of foreign commerce that continues until the goods have arrived at their intended destination, that is, at individual Lowe's stores.

Id. at 936. With this finding made, the court affirmed the ICC's ruling that the inland transportation involved in the case was but a continuation of foreign commerce. Id. at 937.



With this case in mind, 5 the Court turns to the facts of the instant case, and holds that the shipment from Savannah to LaGrange was the continuation of foreign commerce. Plaintiff ordered the equipment which was damaged in the container from a foreign manufacturer. Plaintiff intended for the machinery to be immediately shipped to its factory upon arrival in Savannah via Charleston. The goods remained in Savannah only long enough to clear customs and for Powers to arrange for a common carrier to transport them to LaGrange.

^{5.} Although the North Carolina Utilities case was a review of an administrative action, its analysis and application of the factors used to delineate intrastate commerce from that which is the continuation of foreign commerce is helpful.



The docks at Savannah were not the intended destination of these goods. The ocean bill of lading lists Swift as the "notify party." The separate domestic straight bill of lading shows that he goods had been "imported." Clearly, Savannah was but a mere link in the chain of foreign commerce that continued until the goods arrived at their intended destination, LaGrange. Although the shipment from Savannah to LaGrange did not cross state lines, the essential character of the shipment shows that the inland journey of these goods was the continuation of foreign commerce.

Plaintiff relies primarily upon two decisions to support its argument that the transit from Savannah to LaGrange was intrastate. The first case is <u>Gulf</u>, <u>Colorado and Santa Fe Railway v. Texas</u>, 204 U.S. 403 (1907). In this case, Hardin



Grain Company of Missouri contracted to sell corn to Saylor & Burnett in Goldwaithe, Texas. Hardin, not possessing sufficient corn to fill the order, contracted with the Harroun Commission of Missouri to supply the necessary corn. Harroun, pursuant to Hardin's instructions, shipped the corn by rail from South Dakota to Texarkana, Texas. This shipment was governed by a bill of lading showing Texarkana as the place of delivery. The defendant, Gulf, Colorado and Santa Fe Railway, was not a party to this bill of lading. Five days later, Harroun, action for Hardin, reshipped the corn, via rail, from Texarkana to Goldwaithe under a separate bill of lading.

The defendant, a railroad which had charged the higher interstate rate for its portion of the Texarkana to Goldwaithe



shipment, contended that the temporary interruption of the transit did not change the nature of the shipment, which remained interstate, since the fact that one of the carriers in the route transports wholly within the state of destination is not material. Id. at 408. The Court, however, pointed out that the first contract of carriage was from South Dakota to Texarkana, Texas, and was, of course, an interstate shipment; but

[W]hen the Hardin Company accepted the corn at Texarkana transportation contracted for ended. The carrier was under no further obligations to carry it further. transferred the corn, in obedience to the demands of the owner, to the Texas and Pacific Railway Company, to be delivered by it, under its contract with such owner. Whatever obligations may rest upon the carrier at the terminus of its transportation to deliver to some further carrier, in obedience to the instructions of the owner, it is acting not carrier but simply as a forwarder. No new arrangement having been made for transportation, the com was delivered to the Hardin Company at



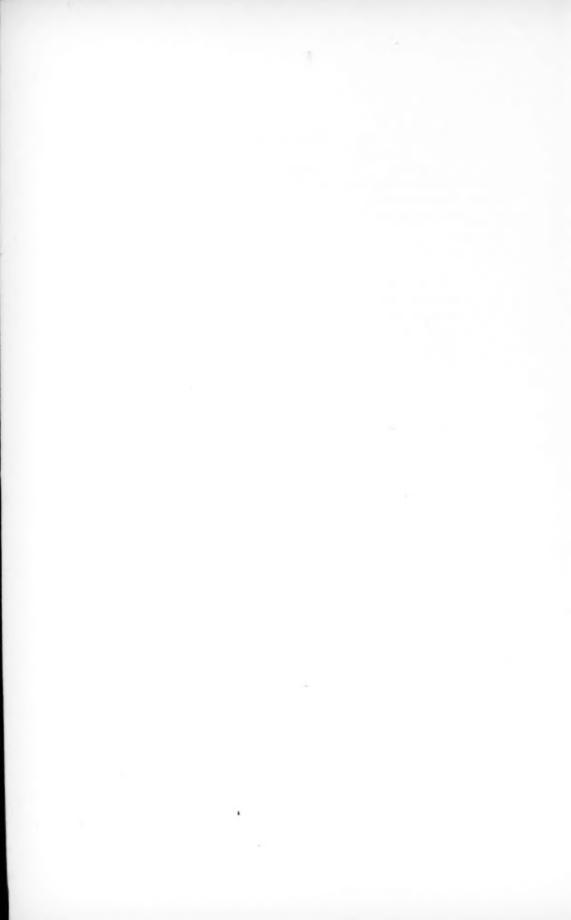
Texarkana. Whatever may have been the thought or purpose of the Hardin Company in respect to the further disposition of the corn was a matter immaterial so far as the completed transportation was concerned.

.

It must be further remembered that no bill of lading was issued from Texarkana to Goldwaithe until after the arrival of the corn at Texarkana, the completion of the first contract for transportation, and the acceptance and payment by the Hardin Company.

Id. at 412-13. The court held the shipment between Texarkana and Goldwaithe to be intrastate.

Plaintiff contends that the <u>Gulf</u> case controls here due to the existence of the two separate bills of lading, one governing out-of-state transportation, the other governing in-state transportation. Under <u>Gulf</u>, plaintiff asserts that the Savannah to LaGrange shipment was intrastate, citing to the following quotation as support for its argument:



"[T]he character of a shipment, whether local or interstate may depend on the contract of shipment." Id. at 412.

Gulf is not controlling here. First, this is an old case which predates the more modern cases which have enunciated the tests to be employed in determining the nature of commerce. Second, it has already been stated that the form of the bill of lading or the fact that part of the shipment is wholly intrastate on a separate bill of lading is not conclusive. See North Carolina Utilities, supra, and cases cited. Third, the corn in the Gulf case reached its destination in Texarkana, Texas and could have remained, or moved intrastate or interstate. By contrast, all shipping documents in the instant case show that Savannah was not the final destination, but only a mere point in the route of these imported goods to the



ultimate purchaser, Swift.

The second decision advanced by plaintiff is Empire Aluminum Corp. v. S.S. Korendiik, 391 F. Supp. 402 (S.D.Ga. 1973). Plaintiff asserts that this case supports its position that the transport of the container from Savannah to LaGrange was intrastate. The Court disagrees. Judge Lawrence was dealing in that case with the different presumptive effect to be given bills of lading issued by ocean carriers and motor carriers, not whether transport of freight from Savannah to an inland Georgia city was intrastate or foreign commerce. Id. at 411.

B. Applicability of the Contractual Limitation Period

Plaintiff contends that the limitation period in bills of lading



permitted by the Carmack amendment cannot apply to imports shipped pursuant to a through bill of lading. 6 Plaintiff cites and argues by analogy the case of Reider v. Thompson, 339 U.S. 113 (1950).

In Reider the plaintiff brought an action against the railroad for damages to a shipment of wool. The wool was shipped from Argentina to New Orleans under an ocean bill of lading, and then traveled under a separate domestic bill of lading from there to Boston on the respondent railroad. The railroad filed a motion

^{6. &}quot;[A] through bill of lading is one with the delivery destination of the goods noted thereon, although transportation of the goods may extend over the lines of connecting carriers." Kenny's Auto Parts v. Baka, 478 F.Supp. 461, 462 n.1 (E.D.Pa. 1979). Plaintiff asserts, and defendant does not seem to disagree, that the ocean bill from Hamburg to Savannah via Charleston was a through bill of lading. There was not, however, a through bill of lading from Hamburg to LaGrange.



to dismiss on the ground that the complaint failed to state a claim under the Carmack amendment. The lower courts had dismissed the action, but the Supreme Court reversed, finding the shipment to Boston subject to the Carmack amendment since it was separate and distinct from shipment under the foreign bill. Id. at 117. The Court noted that there was no through bill of lading from Buenos Aires to Boston, and stated: "The test is not where the shipment originated, but where the obligation of the carrier as receiving carrier originated." Id.

Applying this case to the facts in the case <u>sub judice</u>, plaintiff in essence asserts that the <u>Reider</u> Court found the New Orleans to Boston bill of lading to be within the Carmack amendment because it was separate from the ocean bill, and because the shipment crossed state lines.



Under this analysis, plaintiff contends that the movement of the container from Savannah to LaGrange is not subject to the Carmack amendment because it did not cross state lines, just as a shipment from New Orleans to Baton Rouge would have been outside the Carmack amendment under the Reider facts.

Plaintiff's argument is unpersuasive. It assumes that an interstate movement is required to bring a shipment under ICC jurisdiction and the Carmack amendment. As outlined in Part II A of this Order, however, crossing state lines is not necessary if the movement of goods is a continuation of foreign commerce. The fact that the transport of these goods was the continuation of foreign commerce brings it under ICC jurisdiction and the Carmack amendment, even if state lines were not crossed.



C. Incorporation by Reference

Because the Court finds that the movement of the container from Savannah to LaGrange was the continuation of foreign commerce, it is unnecessary to consider defendant's secondary argument, i.e., if there was an intrastate shipment, the applicable classifications and tariffs were incorporated by reference into the bill of lading by state contract law. See Consolidated Freightways v. Syncroflo, 164 Ga. App. 275 (1982).

III. Conclusion

In summary, the Court has determined that the transportation of the container from Savannah to LaGrange was a continuation of foreign commerce and not an intrastate journey. As stated earlier,



the bill of lading signed by plaintiff's agent acknowledged that the shipment was "received subject to all the classifications and tariffs in effect" on the date of issuance of the bill. Additionally, the agent bound its principal to "all the terms and conditions of the Uniform Domestic Straight Bill of Lading set forth ... (2) in the applicable motor carrier classification or tariff" when it signed the bill of lading.

Because this shipment was one under ICC jurisdiction, it naturally follows that the classifications and tariffs "in effect" and applicable were those Watkins had on file with the ICC. The classifications and tariffs, incorporated into the bill of lading signed by plaintiff's agent, require that suit "must be brought within two years and one day" after the plaintiff receives notice in



writing from the carrier denying its claim. As this time limitation was not met by plaintiff, defendant's motion for summary judgment must be GRANTED.

SO ORDERED, this 18th day of December, 1985.

B. Avant Edenfield
Judge, United States Court
Southern District of
Georgia



APPENDIX 5

CASE NO.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1986

SWIFT TEXTILES, INC.,

Petitioner,

v.

WATKINS MOTOR LINES, INC.,

Respondent.

OF THE U.S. SUPREME COURT RULES

In accordance with Supreme Court Rule 28.1, Petitioner Swift Textiles, Inc. certifies that the following is a complete list of all parent companies, subsidiaries and affiliates.

Swift Textiles, Inc. is a wholly owned subsidiary of Dominion Textile (USA)
Inc., 1040 Avenue of the Americas, New York, New York 10018. Swift Textiles,
Inc. has no subsidiaries or affiliates.



APPENDIX 6

IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM 1986

SWIFT TEXTILES, INC.,)		
Petitioner,		
vs.)	Eleventh Case No.	
WATKINS MOTOR LINES,	case No.	85-9005
Respondent.)		

PROOF OF FILING AND SERVICE

I, the undersigned ALAN S. GAYNOR, attorney of record for the Petitioner and a member of the Bar of the Supreme Court of the United States, deposes and says that on the 10th day of February, 1987, I filed 40 copies of the foregoing SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI to the Supreme Court of the United States with the Clerk of the Supreme Court of the United States and I served three copies of this SUPPLEMENTAL APPENDIX TO PETITION FOR

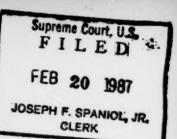


WRIT OF CERTIORARI to the Supreme Court of the United States on John B. Miller, attorney for Respondent, whose address is Miller, Simpson & Tatum, Post Office Box 1567, Savannah, Georgia 31498, who are all the parties required to be served, by causing to be placed these copies of said SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI in an authorized depository for mail at a United States Post Office in a properly addressed envelope with sufficient prepaid postage thereon to insure First Class Certified Mail delivery within the time allowed for such filing.

THIS 6 day of February, 1987.

ALAN S. GAYNOR Attorney for

Petitioner



CASE NO. 86-1320

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1986

SWIFT TEXTILES, INC.,

Petitioner,

V.

WATKINS MOTOR LINES, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENT

JOHN B. MILLER
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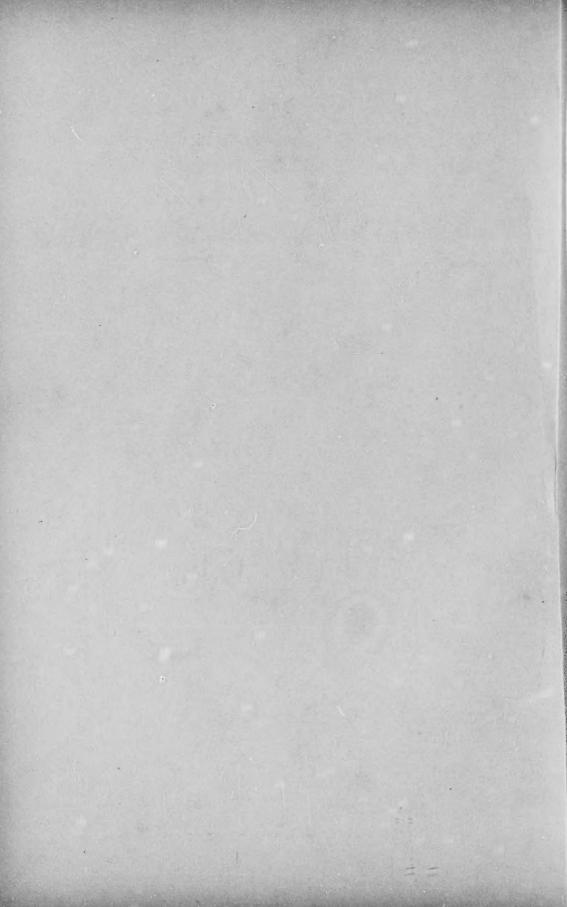


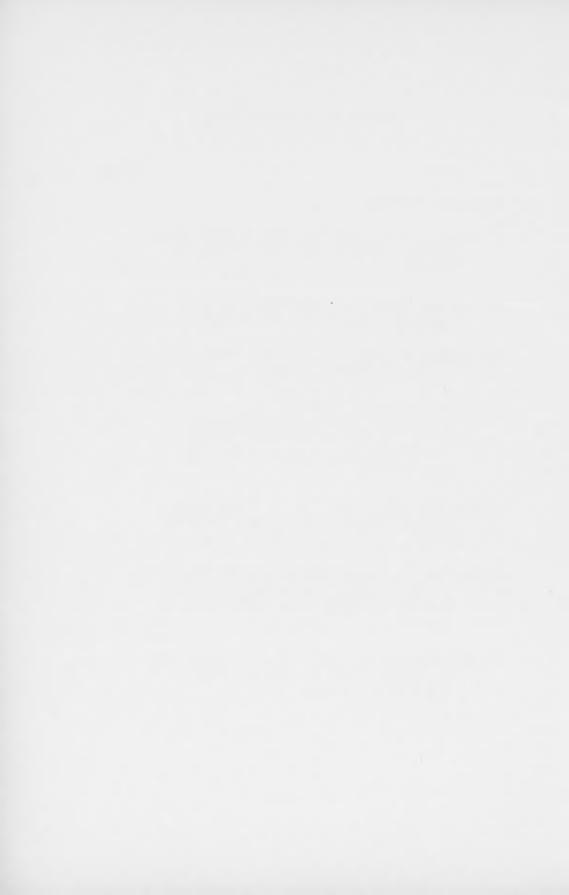
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CASE NO. 86-1320

IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM 1986

SWIFT TEXTILES, INC.,

Petitioner,

v.

WATKINS MOTOR LINES, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENT

I.

STATEMENT OF CASE

Respondent believes that pertinent additions to the statement of the case would be constructive.

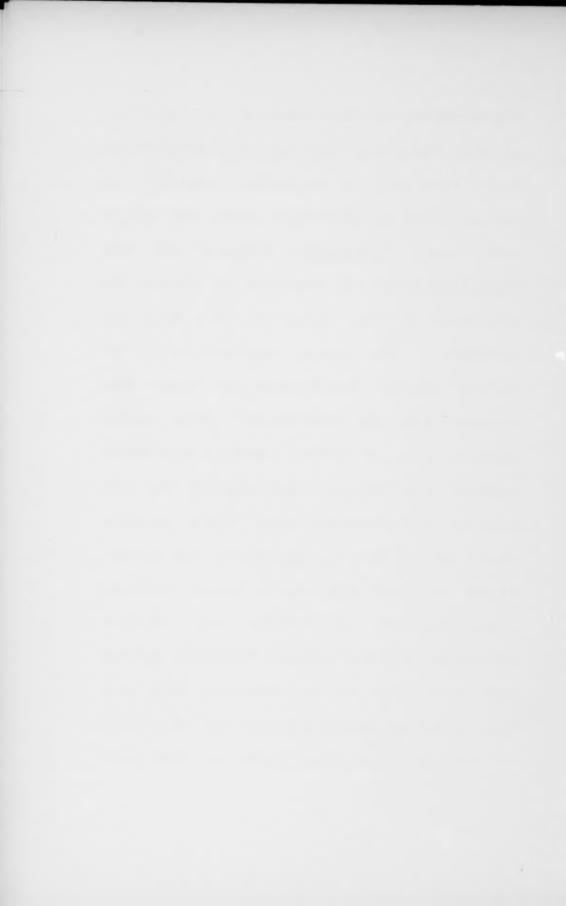
At all times Petitioner, who purchased the spinning machinery from Rieter



Machine Works, Ltd. in Basle, Switzerland, was the ultimate consignee at LaGrange, Georgia. The ocean bill of lading shows Rieter as the Exporter, D.J. Powers Company, Inc. of Savannah, Georgia (Petitioner's agent, Freight Forwarder and custom house broker), as Consignee and Petitioner as the Notify Party. The destination on the ocean bill was Savannah. The container came to rest only temporarily in a trucking company holding yard in Savannah solely for the purpose of awaiting arrangement by Petitioner for motor carrier movement to LaGrange, Georgia. Petitioner's agent prepared the bill of lading on agent's short form of motor carrier uniform straight bill of lading. Agent's short form motor carrier bill of lading contained the the following certification: "It is certified that



the property in this receipt was imported in the importing carrier TFL Enterprise Sing. from port of Hamburg". The bill of lading also acknowledged that the shipment was: "Received, subject to the classification and tariffs in effect on the date of the issue of this Bill of Lading". The motor carrier bill of lading showed Petitioner as both the shipper and the consignee. This motor carrier bill of lading recited agreement between the shipper (Petitioner) and the carrier (Respondent) that every service would be subject to the terms and conditions of the applicable motor carrier classification or tariff and further contained the following: "Shipper hereby certifies that he is familiar with all the terms and conditions of the said bill of lading, including those on the back



thereof, set forth in the classification or tariff which governs the transportation of the shipment, and the said terms and conditions are hereby agreed to by the shipper and accepted for himself and his assigns". (Emphasis added)

Respondent had no intrastate operating rights in the State of Georgia and thus had no tariffs on file with the Georgia Public Service Commission. The only tariff of Respondent available to Petitioner or its agent at Savannah was the tariff governing imported containers on file with the Interstate Commerce Commission, governing the motor carrier transportation of containers which had been imported by ocean carrier. This was the tariff to which the motor carrier bill of lading prepared by Petitioner's agent committed Petitioner to be bound.



It was the only applicable Carmack permissible tariff in existence and contained the two-year, one-day Statute of Limitations.

II.

SUMMARY OF RESPONDENT'S ARGUMENT

A.

The Eleventh Circuit Court Correctly

Held That the Carmack Amendment to the

Interstate Commerce Act Applies to the

Savannah, Georgia to LaGrange, Georgia

Segment of the Movement of a Shipment

Originating in Basle, Switzerland Destined to LaGrange, Georgia.

The shipment from Basle, Switzerland to LaGrange, Georgia was one single continuous movement of a product manufactured in Basle, Switzerland, purchased by Petitioner from the Swiss manufacturer, and imported by Petitioner to



LaGrange, Georgia. When the shipment left Basle the consignee was Petitioner at LaGrange, Georgia, and it never became a part of the general mass of commerce in the United States and never came to rest until delivered to LaGrange, Georgia. The fact that destination on the ocean bill was the Port of Savannah, Georgia and that the subsequent movement was on a separate bill of lading does not change the character of the commerce. It is difficult to find a fact situation where the nature of the commerce was more clearly defined from point of origin to point of destination as being a single movement of foreign commerce. Neither the ultimate consignee nor the ultimate destination ever changed. The Interstate Commerce Commission has jurisdiction over the transportation by motor carrier of



property transported by motor common carrier "between a place in the United States and a place in a foreign country to the extent that the transportation is in the United States" 49 U.S.C. § 10521(a)(1)(E). The statute does not say "from" a place in the United States "to" a place in a foreign country but "between" the places. Thus it covers the domestic segment of the movement in either direction.

В.

The Eleventh Circuit Court Correctly

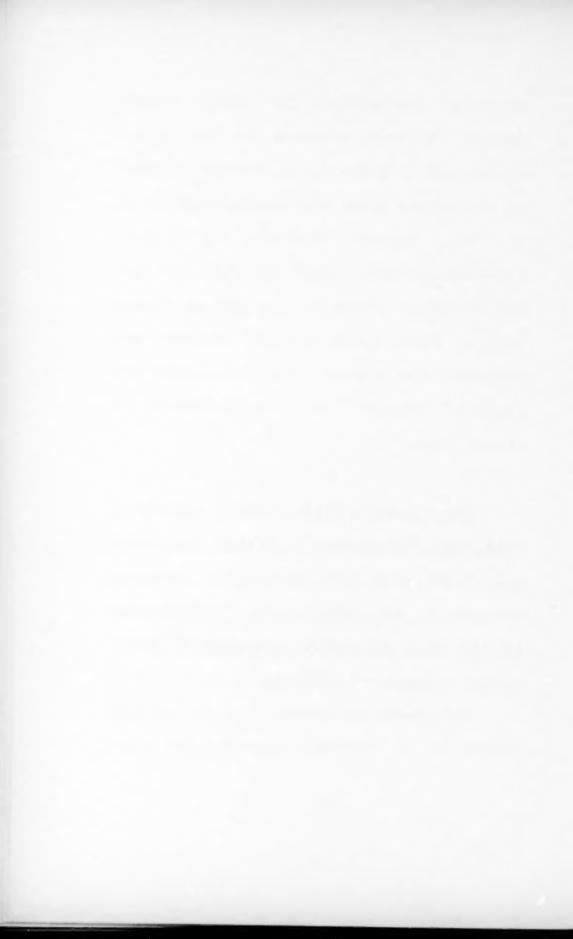
Held that Respondent's Tariff Published

and Filed with the Interstate Commerce

Commission was Effectively Incorporated

in the Bill of Lading Prepared by Peti
tioner's Agent at Savannah.

The Eleventh Circuit Court opinion sought to be reviewed does not conflict



with any opinion of any other Circuit Court nor any prior opinion of the Eleventh Circuit as contended by Petitioner.

III.

ARGUMENT

A.

The Eleventh Circuit Court Correctly

Held That the Carmack Amendment to the

Interstate Commerce Act Applies to the

Savannah, Georgia to LaGrange, Georgia

Segment of the Movement of a Shipment

Originating in Basle, Switzerland Destined to LaGrange, Georgia.

The jurisdiction of the Interstate Commerce Act governed the motor carrier movement from Savannah, Georgia to LaGrange, Georgia because that movement was transportation by a motor common carrier "between a place in the United



States and a place in a foreign country to the extent that the transportation is in the United States." 49 U.S.C. § 10521(a)(1)(E).

No more clearly stated authority for this conclusion can be cited than that contained in the opinion of the Eleventh Circuit in this case:

"The nature of a shipment is not determined by a mechanical inspection of the bill of lading nor by when and to whom title passes but rather by 'the essential character of the commerce' United States v. Erie RR Co., 280 U.S. 98, 102, 50 S.Ct. 51, 53, 74 L.Ed. 187, 206 (1929), reflected by the 'intention formed prior to shipment, pursuant to which property is carried to a selected destination by a continuous or unified movement', Great Northern RR Co. v.



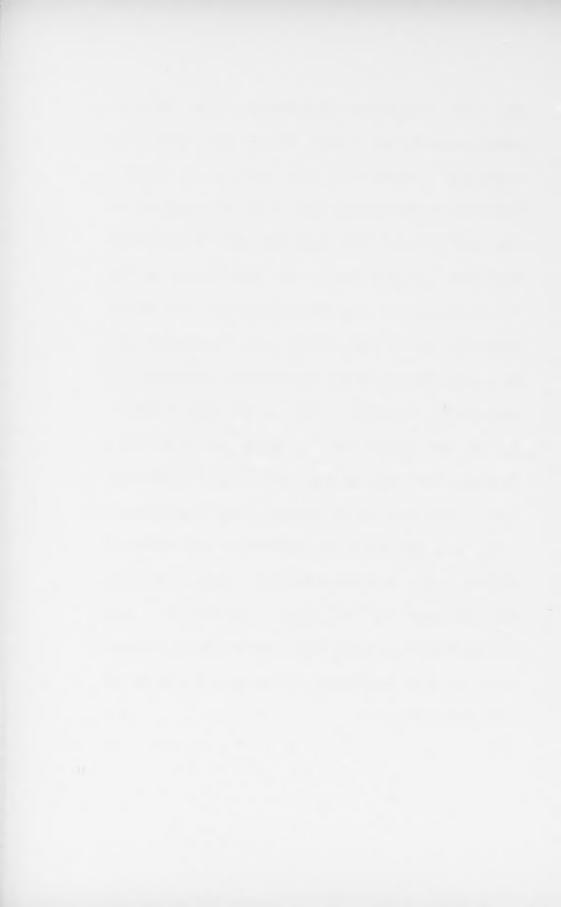
Thompson, 222 F. Supp. 573, 582 (D.N.D. 1963) (3-judge court).

"It is well settled that, in determining whether a particular movement of freight is interstate or intrastate or foreign commerce, the intention existing at the time the movement starts governs and fixes the character of the shipment...[T]emporary stoppage within the State, made necessary in furtherance of the interstate carriage, does not change its character."

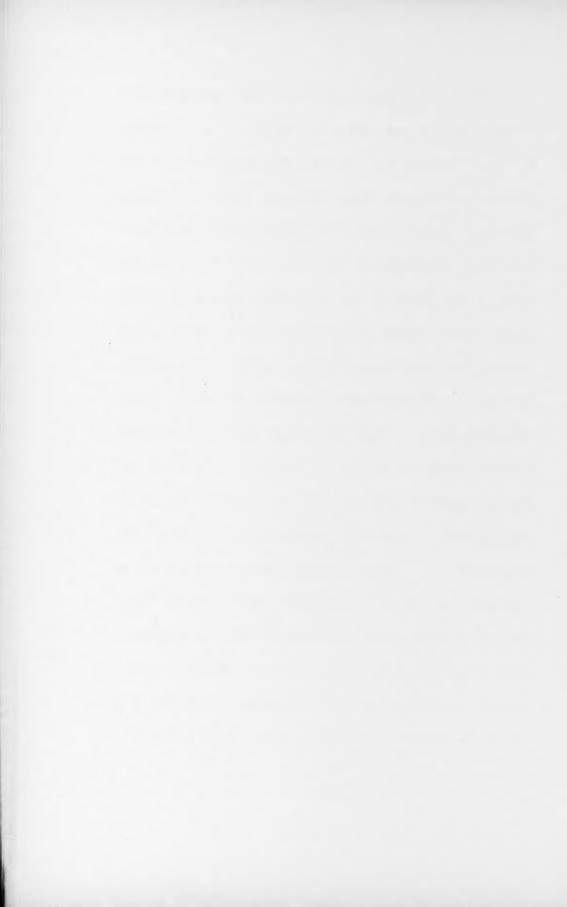
The fact situation here is unequivocal. All of the facts demonstrate with unimpeachable clarity that Petitioner was the consignee of the movement at all times from origin at Basle, Switzerland to destination at LaGrange, Georgia. Petitioner bought the machinery from the Swiss manufacturer. The record is silent



on the shipping document from Basle, Switzerland to the Port of Hamburg, Germany. However, the record is clear. Petitioner's agent was the consignee on the ocean bill of lading and Petitioner was the notify party on the ocean bill. Petitioner was the consignee on the motor carrier bill on which the textile machinery moved from Savannah, Georgia to LaGrange, Georgia. There is not a scintilla of evidence to suggest that the "essential character of the commerce" ever changed from being one continuous movement of foreign commerce by various forms of transportation from Basle, Switzerland to LaGrange, Georgia. intermediate stops were only those essential to the mechanical changes in mode of transportation.



The jurisdiction of the Interstate Commerce Commission under 49 U.S.C. § 10521(a)(1)(E) is beyond question. 49 U.S.C. § 10762 requires a motor common carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission to publish and file with the Commission tariffs containing rates, classifications, rules and practices. Respondent complied with this requirement. The parties agreed in the motor carrier bill of lading prepared by Petitioner's agent to be bound by the published tariffs applicable to the The applicable published movement. tariff on file with the Interstate Commerce Commission contained the two-year, one day limitation within which suit could be brought as is authorized by the Carmack Amendment [49 U.S.C. § 11707(e).]



A case very much in point which was most convincing both to the trial judge and to the Eleventh Circuit Court of Appeals is the three judge court case of North Carolina Utilities Commission v. U.S., 253 F. Supp. 930 (E.D.N.C. 1966).

В.

The Eleventh Circuit Court Correctly

Held that Respondent's Tariff Published

and Filed with the Interstate Commerce

Commission was Effectively Incorporated

in the Bill of Lading Prepared by Peti
tioner's Agent at Savannah.

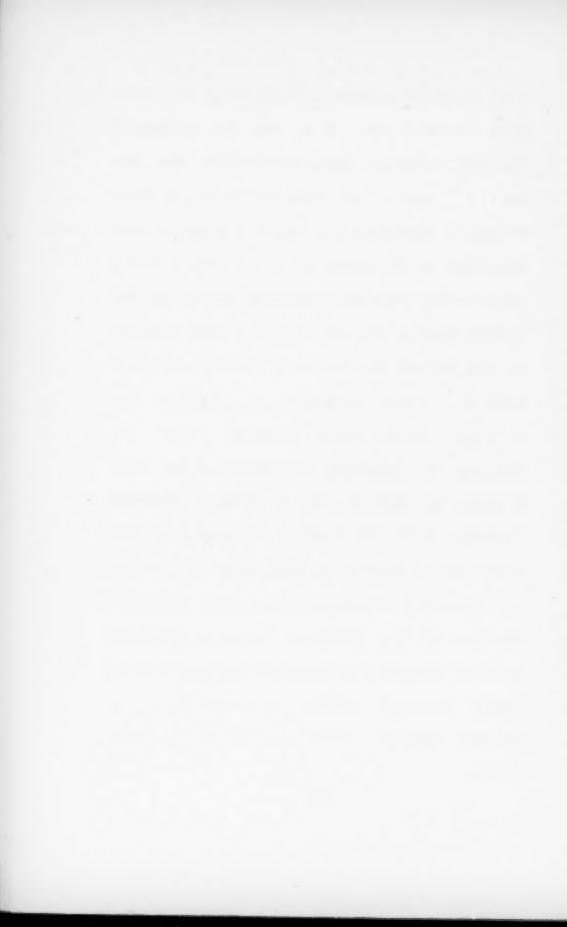
There is no conflict between the decision of the Eleventh Circuit in this case which is the object of the Petition for Writ of Certiorari and any decision of the United States Supreme Court, or of the Eleventh Circuit or any other Circuit.



Petitioner argues that the opinion of the Supreme Court of the United States in Reider v. Thompson, 339 U.S. 113, 70 S.Ct. 499, 94 L.Ed. 698 (1950) is authority for the proposition that if a continuous movement from a foreign country to a destination within the United States moves on a separate bill of lading from the port of entry in the United States the character of the commerce is controlled by whether the shipment crosses state lines within the U.S. From this Petitioner argues that the movement from Savannah, Georgia to LaGrange, Georgia is intrastate commerce and not subject to an interstate tariff on file with the Interstate Commerce Commission. The original wording of the Carmack Amendment in 49 U.S.C. 20(11) appeared to limit the Carmack Amendment to interstate commerce

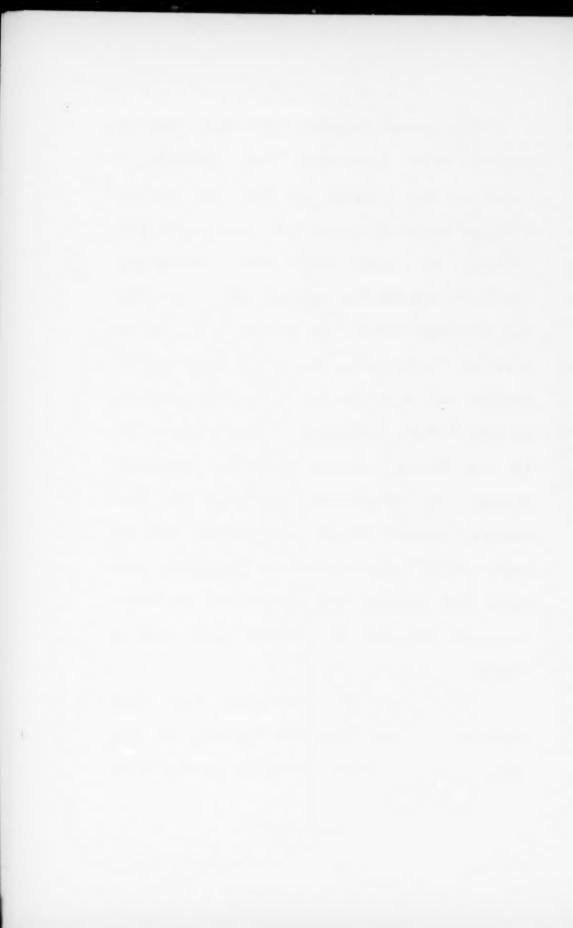


and foreign commerce involving a point from within the U.S. to an adjacent foreign county, thus excluding the domestic segment of inbound foreign commerce. Apparently, this language was designed by Congress to avoid legislating concerning foreign commerce entering the United States and moving to a destination in the United States on a foreign bill of lading. See Condakes v. Smith, 281 F. Supp. 1014, 1015 (D.Mass. 1968) involving a shipment of cantaloupes from Mexico to Boston on a single through foreign bill of lading. However, the teaching of Reider v. Thompson is that on an imported movement when the domestic portion of the movement is on a separate bill of lading the Carmack Amendment will apply without regard to whether the United States segment crosses state lines.



The recodification of the United States Code involving the Interstate Commerce Act found in the 49 U.S.C. § 10521(a)(1)(E) clarifies this point and renders it clear that the Interstate Commerce Commission has jurisdiction over the transportation of property by motor carrier "between a place in the United States and a place in a foreign country to the extent that the transportation is in the United States". This language avoids the distinction between the domestic segment of an importation and an exportation relied upon in Condakes, and thus now avoids the necessity to distinguish between a foreign bill and a domestic bill.

Petitioner also contends that the decision of the Eleventh Circuit in the case sought to be reviewed is in conflict



with the Eleventh Circuit decision of Allstate Ins. Co. v. Int'l Shipping Corp., 703 F.2d 497 (11th Cir. 1983), and the Fifth Circuit decision in Marvirazon Compania Naviera, S.A. v. H.J. Baker & Bros. Inc., 674 F.2d 364, 366 (5th Cir. 1982). These cases involved admiralty law, ocean shipping and liability of ocean carriers. The Carriage of Goods by Sea Act (COGSA), 46 U.S.C. § 1303(6), prescribes a one year Statute of Limitations for liability of the ocean carrier and the ship and narrowly defines the areas of liability. The Harter Act, 46 U.S.C. § 190, makes it unlawful for an ocean carrier to insert in a bill of lading any provision limiting the carrier's liability. On the one hand Congress carefully protected ocean carriers in COGSA and on the other in Harter



prohibited insertions in bills of lading attempting to further limit liability. The statutory schemes and judicial decisions involving ocean carriage under COGSA and Harter and land carriage under the Carmack Amendment cannot be analogized as the histories and statutory approaches are so vastly different. It is interesting that the colorful author of the opinion sought to be here reviewed was likewise the author of Marvirazon. Marvirazon held actual notice of the one year tariff limitation of the stevedore liability on file with the Federal Maritime Commission was necessary because such limitations are not required by law to be in the tariff. The Eleventh Circuit opinion in the present case sought to be reviewed deals very effectively with the distinctions between these

cases. Another point that should be mentioned is that the contract of carriage which Petitioner seeks to evade was prepared by Petitioner's own agent, a presumably experienced custom house broker and this contract bound the parties to the terms and conditions of the tariff and classifications governing the movement. Certainly a custom house broker knows that the bill of lading it prepares which certified that the container had a prior ocean movement would be subject to the applicable container tariff on file with the Interstate Commerce Commission. Petitioner in this case is not a victim of any unfair fine print in a contract but is a victim of its own failure to file suit within the period authorized by statute and provided by the contract of carriage. Furthermore,

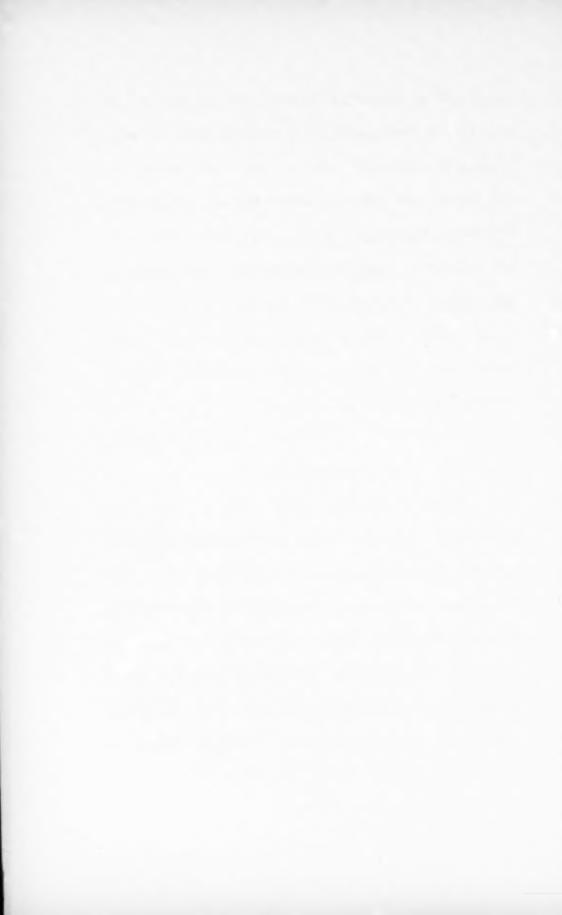


Petitioner is chargeable, as a matter of law, with notice of the tariff and classification required to be on file with the Interstate Commerce Commission. American Railway Express Co. v. Daniel, 269 U.S. 40 (1925); Farley Terminal Company v. Atchison, Topeka and Santa Fe Ry., 522 F.2d 1095 (9th Cir.), cert. den., 423 U.S. 996 (1975). Petitioner's actual knowledge is irrelevant.

IV.

CONCLUSION

The Petition for Writ to the Eleventh Circuit does not qualify under United States Supreme Court Rule 17. The Petition does not present to the United States Supreme Court a conflict of decisions within the Eleventh Circuit or a conflict of decisions with another Circuit nor a conflict with a State Court of



last resort nor has it so far departed from the accepted and usual course of judicial proceedings or so far sanctioned such a departure by a lower court as to call for the exercise by the United States Supreme Court of its power of supervision nor does it otherwise in any manner suggest the need for the Supreme Court of the United States to exercise its discretion to review the Circuit opinion.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted, MILLER, SIMPSON & TATUM

BV

Jøn B. Miller

counsel for Respondent

Post Office Box 1567 Savannah, GA 31498 (912) 233-5722



IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM 1986

SWIFT TEXTILES, INC	,)
Petitioner,	j
vs.) CASE NO. 86-1320
WATKINS MOTOR LINES	,)
Respondent.)

PROOF OF FILING AND SERVICE

I, the undersigned JOHN B. MILLER, attorney of record for the Respondent and a member of the Bar of the Supreme Court of the United States, deposes and says that on the 18th day of 1 houry, 1987, I filed 40 copies of the foregoing BRIEF OF RESPONDENT ON WRIT OF CERTIORARI to the Supreme Court of the United States with the Clerk of the Supreme Court of the United States and I served three copies of this BRIEF OF RESPONDENT ON



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such filing.

John B. Miller
Counsel for Respondent
Post Office Box 1567
Savannah, GA 31498
(912) 233-5722

Sworn to and subscribed before me this 18th day of February, 1987.

Notary Public, State of Georgia

My Commission Expires:

JUDITH L. ASARO Notary Public, Chatham County, Georgia My Commission Expires Oct. 31, 1989